

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 FOR THE COUNTY OF YAVAPAI

2011 DEC -6 AM 9:59

SANDRA K MARKHAM, CLERK

Jacqueline Markham

STATE OF ARIZONA,)

Plaintiff,)

vs.)

JAMES ARTHUR RAY,)

Defendant.)

Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS
 BEFORE THE HONORABLE WARREN R. DARROW

AGGRAVATION TRIAL DAY THREE

JUNE 30, 2011

Camp Verde, Arizona

ORIGINAL

REPORTED BY
 MINA G. HUNT
 AZ CR NO. 50619
 CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 FOR THE COUNTY OF YAVAPAI
3

4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs.) Case No V1300CR201080049
7 JAMES ARTHUR RAY,)
8 Defendant.)
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1 Proceedings had before the Honorable
2 WARREN R. DARROW, Judge, taken on Thursday,
3 June 30, 2011, at Yavapai County Superior Court,
4 Division Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.
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1 APPEARANCES OF COUNSEL: 2

2 For the Plaintiff:

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1 P R O C E E D I N G S
2 THE COURT: The record will show the presence
3 of Mr. Ray, represented by Mr. Li; the state
4 present through Ms. Polk and Mr. Hughes.
5

6 You have the note from the jury,
7 Ms. Polk?

8 MS. POLK: Yes, we do.

9 THE COURT: Mr. Li?

10 MR. LI: Yes, Your Honor.

11 THE COURT: Mr. Kelly is now present as well.
12 It -- it just says the jury cannot come to an
13 agreement on the aggravating circumstances Count I
14 and III. And then it goes on from there. I have
15 the original here. And, of course, that will be
16 filed.

17 Ms. Polk.

18 MS. POLK: Your Honor, the state would direct
19 the Court's -- would direct the Court's attention
20 to Rule 22.4 of the rules of criminal procedure,
21 assisting jurors at an impasse, and ask that the
22 Court follow this procedure. The comment to the
23 rule sets out the proposed instruction that the
24 jury -- or the Judge reads to the jury. And if the
25 jury indicates that they can use assistance, then
this rule lays out what the procedure would be.

1 And I would specifically note that the
2 last paragraph to the comment states that if the
3 jury identifies one or more issues that divide
4 them, the Court, with the help of the attorneys,
5 can decide whether and how the issues can be
6 addressed. Among the obvious options are the
7 following: Giving additional instructions,
8 clarifying earlier instructions, directing the
9 attorneys to make additional closing arguments,
10 reopening the evidence for limited purposes, or a
11 combination of these measures.

12 Of course, the Court might decide it is
13 not legally or practically possible to respond to
14 the jurors' concerns. And I would just note that
15 the first sentence of that comment to the rule
16 states, many juries are needlessly discharged very
17 soon thereafter and a mistrial declared when it
18 would be appropriate and might be helpful for the
19 Judge to offer some assistance, improving the
20 changes of a verdict.

21 So the state would request that the Court
22 follow the procedure set out in Rule 22.4.

23 THE COURT: Mr. Kelly.

24 MR. KELLY: Judge, I've dealt with this
25 problem and Rule 22.4 several times in the past.

1 And my experience is that, as indicated by the
2 rule, you would bring them in. You would ask
3 whether or not the Court and counsel can provide
4 any assistance and listen to their response.

5 The suggestion articulated by the State
6 of Arizona is discretionary with the Court, as
7 indicated in 22.4 after receiving the response that
8 you may direct further proceedings. And so I
9 believe the first step is to bring them in, ask
10 them if they're at an impasse and whether anything
11 additional would help them break that impasse.

12 My experience has been, based on that
13 response, typically there is not anything further
14 that can be done. But we would need to ask that
15 preliminary question.

16 THE COURT: What I've done on a number of
17 occasions has been to bring them in and ask the
18 foreman -- this is not in any way trying to force
19 you to a verdict, anything like that. I always
20 stress that. But if you think it would be helpful
21 to have further discussion, then I need to know
22 that. And there might be things we can help you.

23 And then I would just have them go back
24 and talk and then bring a note out as to whether or
25 not that would work.

1 There is a specific instruction now in
2 the 2011 revised -- if someone could assist me. I
3 don't have my bailiff here. I'd like the parties,
4 if we can distribute -- I've got a number of
5 copies. If we can distribute them to people.

6 This is the most recent instruction. And
7 it suggests you just give that -- just have it
8 taken back to them in writing. They can read it.
9 The only thing I added in that instruction is an
10 advisement not to tell the Court what the numerical
11 breakdown of the vote is. I don't think they
12 should be doing that.

13 But that is in the most recent 2011 RAJI
14 instructions. And, essentially, it sets out more
15 systematically what the Rule 24 suggestions are, I
16 think.

17 MS. POLK: Your Honor, the state would agree
18 with providing this to the jury.

19 THE COURT: Make sure you've read it. There
20 was one prior much more abbreviated. This really
21 contemplates just having the jury -- just give them
22 all a copy, and they can just advise us if they
23 want further assistance on an issue.

24 MR. KELLY: Judge, I was returning to my seat.
25 Which portion did you add?

1 THE COURT: Only thing I added, Mr. Kelly, is
2 on paragraph 3, the last sentence that says, please
3 do not advise the Court of the numerical breakdown
4 of the juror vote on these issues. That's the only
5 thing I added.

6 Go ahead. If you want to confer, please
7 feel free to do that.

8 MR. KELLY: Judge, may I be heard?

9 THE COURT: Sure.

10 MR. KELLY: Judge, given the jury question
11 from yesterday --

12 THE COURT: And the definition of "unique."

13 MR. KELLY: Length of time they've been
14 deliberating. And I believe it would be
15 appropriate -- let me say it this way,
16 incorporating the pleadings and arguments made by
17 Ms. Seifter yesterday morning, I believe it points
18 out the problems that we identified with these two
19 specific aggravating circumstances.

20 No. 1, pecuniary gain, simply does not
21 relate or apply to a circumstance such as this.
22 And then, importantly, No. 3 as well. And that's
23 what I would interpret the juror question from
24 yesterday to apply to as No. 3. We argued that
25 extensively.

1 So before answering your question
2 regarding this proposed or new RAJI, we would make
3 a motion at this time to strike circumstances No. 1
4 and 3 based on our prior arguments, the jury -- the
5 juror question yesterday, as well as today's note
6 that they're at an impasse.

7 THE COURT: Ms. Polk, response to that motion.

8 MS. POLK: Your Honor, the state would ask the
9 Court not to grant that motion for all the reasons
10 that we've already discussed, the fact -- and the
11 Court has already ruled on it and denied such a
12 motion. The fact that the jury is at an impasse
13 would not give rise to granting that motion. The
14 state would renew our request that you provide to
15 the jury this instruction.

16 THE COURT: Mr. Kelly, anything further on the
17 motion?

18 MR. KELLY: No, Judge.

19 THE COURT: I didn't make an extensive record
20 regarding the condition 3. But the way I've
21 regarded that is this way: Ms. Seifter noted the
22 due-process case, what I call the "due-process
23 case." That could not be the basis for an enhanced
24 sentence. It doesn't provide notice.

25 But over the years and in the sentencing

1 proceedings I've done, there have been many
2 aggravating and mitigating circumstances that are
3 advanced. And the catch all is the catch all. And
4 they now have to go to the jury if they're going to
5 be considered as vague or nebulous as they may or
6 may not be. So that is really the situation with
7 No. 3.

8 I'm going to deny the motion. I'm going
9 to go ahead at this point -- they have been
10 considering this matter now for a number of hours.
11 But I'm going to go ahead then -- well, that's the
12 first thing.

13 Mr. Kelly, you wanted a motion on that.
14 You wanted to be heard further regarding this
15 written instruction.

16 MR. KELLY: And, Judge, this appears to be
17 appropriate to us.

18 THE COURT: Okay. Then I'll just run off 12
19 copies, and the bailiff will deliver them.

20 Thank you. We'll be in recess. Thank
21 you.

22 (Recess.)

23 THE COURT: The record will show the presence
24 of Mr. Ray, represented by Mr. Kelly and Mr. Li,
25 and the state present through Ms. Polk and

1 Mr. Hughes.

2 I got this response. I'm not exactly
3 clear what it means. At this point in time the
4 jury does not wish further instructions from the
5 Court.

6 Does that mean they still want to talk
7 about it or not?

8 Ms. Polk.

9 MS. POLK: I would agree, Your Honor.

10 THE COURT: Mr. Kelly.

11 MR. KELLY: I guess I have a different
12 interpretation.

13 THE COURT: Mr. Kelly, my first interpretation
14 was no more instruction. We're done but -- when I
15 look at it this way. So the only thing I have is,
16 once again -- trying to get my original here.

17 MR. KELLY: I think that puts us back to 22.4,
18 the requirement to bring them in and confirm, at
19 least my suspicion that --

20 THE COURT: Well, in order to have people
21 coming back -- I had proposed that question I would
22 put back through them, which is, members of the
23 jury, please clarify. Do you wish to proceed with
24 further deliberation? And then they can say yes or
25 no, and we just proceed rather than have a

1 dialogue.

2 MR. KELLY: That's fine.

3 THE COURT: Just so the parties have a copy of
4 what I'm going to give them and file. I got three.
5 If you make sure each side gets a copy of the
6 answer. Make sure you look at that. And then I'm
7 going to file -- I don't think I gave you the
8 original instruction -- that's given to them. This
9 is the last question. And then the lawyers are
10 looking over my proposed response. Please clarify.
11 Do you wish to proceed?

12 Any objection to that, Counsel?

13 MR. KELLY: No.

14 MS. POLK: No, Your Honor.

15 THE COURT: Stand by, please. Thank you.

16 (Recess.)

17 THE COURT: The record will show the presence
18 of Mr. Ray and the attorneys.

19 And the response to the question. You
20 have it. We are hopelessly deadlocked. I think it
21 might have been a different word perhaps. My
22 suggestion at this point is I think they need to
23 come in and verify that's the situation, if they
24 have verdicts prepared. At first I was concerned
25 that they were providing numbers. But they're not.

1 It's three times three. So they have a mix of what
2 they've decided on the three different forms.

3 So what I'll do, though, is I'd just like
4 to just tell Heidi since they're going to be coming
5 in for a few minutes, make sure they have the
6 verdict forms in their envelopes for me and going
7 from there.

8 Ms. Polk.

9 MS. POLK: The state agrees, Your Honor.

10 THE COURT: Okay.

11 Mr. Kelly.

12 MR. KELLY: Judge, we agree. And I'm assuming
13 that after they're discharged we will meet.

14 THE COURT: Here's the situation: I will --
15 I'm going to ask when they are excused, I ask the
16 parties to remain. The parties will remain. There
17 will be other things to discuss. I'm going to ask
18 the jurors in a request that they assemble in the
19 large hearing room on this floor down on the end.
20 I'll give them further instructions.

21 I'm going to tell you that after a trial
22 I like to go thank the jurors personally and I
23 always invite the lawyers to do that with me. So I
24 would go back there and thank them. And the
25 attorneys are invited, of course, as well.

1 And I'm also going to read them the
2 letter that you had provided. It came from the
3 other media outlet. It was the In Session
4 producer. And there is a different entity now.
5 But that entity is still interested in that.

6 And then after I thank them, I was just
7 going to read them this and then give them the
8 instructions if they wish to come back out. But
9 what I'm going to do -- I'm not going to be there
10 very long. And then the attorneys can meet with
11 the jurors back in that area. And then they can
12 return out here afterwards. That was my intention.

13 But I'm going to leave. And then to the
14 extent you want to continue to meet with them, you
15 will be back there in the hearing room.

16 MR. KELLY: Judge, I just want to advise you
17 that after the jury is discharged, we have a legal
18 issue.

19 THE COURT: Yes. That's what I mean. Yes.
20 There will be things to discuss. Okay.

21 MS. POLK: Your Honor, was it your
22 intention -- you said they would come back here.
23 Meaning the jurors? When everyone is here, they'd
24 come back through this courtroom?

25 THE COURT: I'm going to let people use this

1 hallway here. Everything can be out here. If they
2 want to return for this meeting with the press,
3 with the media. You know the letter I'm referring
4 to? You got copies of it?

5 MR. KELLY: We did.

6 THE COURT: Okay.

7 MR. KELLY: Yeah. I'm good.

8 THE COURT: Thank you.

9 (Recess.)

10 (Proceedings continued in the presence of
11 jury.)

12 THE COURT: The record will show the presence
13 of Mr. Ray, represented by Mr. Kelly, Mr. Li, and
14 Ms. Seifter. The state is present through Ms. Polk
15 and Mr. Hughes. And the jury has returned.

16 And, ladies and gentlemen, first I want
17 to talk to Juror No. 10, the foreman.

18 Juror No. 10, does the jury wish to have
19 any further deliberation in this matter?

20 JURY FOREMAN: No, Your Honor.

21 THE COURT: I just wanted to confirm that.
22 It's my understanding, though, that you have
23 reached verdicts as to some of the aggravating
24 circumstances?

25 JURY FOREMAN: Yes, sir.

1 THE COURT: Okay. So as the jury has reached
2 some verdicts, would you please hand all the
3 verdict forms to the bailiff at this time. And she
4 will bring them to me.

5 Okay. The clerk will now read and record
6 the aggravating circumstance verdicts.

7 THE CLERK: In the Superior Court of the State
8 of Arizona, in and for the County of Yavapai, State
9 of Arizona, plaintiff, versus James Arthur Ray,
10 defendant, V1300CR201080049; aggravating
11 circumstance verdict, victim Kirby Brown, Verdict
12 Form Count I: We, the jury, duly -- duly empaneled
13 and sworn in the above-entitled action, upon our
14 oaths do find the following aggravating
15 circumstance No. 2: The victim or if victim has
16 died as a result of the conduct of the defendant,
17 the victim's immediate family suffered emotional
18 harm. Proven. The above is the unanimous finding
19 of the jury, signed foreman.

20 Aggravating circumstance verdict, victim
21 Lizbeth Neuman, Verdict Form Count II, caption
22 omitted: We, the jury, duly empaneled and sworn in
23 the above-entitled action, upon our oaths do find
24 the following: Aggravating circumstance No. 2.
25 The victim or if the victim has died as a result of

1 the conduct of the defendant, the victim's
2 immediate family suffered emotional harm. Proven.

3 Aggravating circumstance No. 3. The
4 defendant was in a unique position of trust with
5 the victim. Proven. The above is the unanimous
6 finding of the jury, signed foreman.

7 Aggravating circumstance verdict, victim
8 James Shore, Verdict Form Count III, caption
9 omitted: We, the jury, duly empaneled and sworn in
10 the above-entitled action, upon our oaths do find
11 the following: Aggravating circumstance No. 2, the
12 victim or if the victim has died as a result of the
13 conduct of the defendant, the victim's immediate
14 family suffered emotional harm. Proven. The above
15 is the unanimous finding of the jury, signed
16 foreman.

17 Members of the jury, are these your true
18 and correct verdicts?

19 JURY PANEL: Yes.

20 THE COURT: Do counsel wish to poll the jury?

21 Ms. Polk?

22 MS. POLK: No, Your Honor.

23 THE COURT: Mr. Kelly?

24 MR. KELLY: No. Thank you.

25 THE COURT: If I could have the verdict forms

1 back. I do want to address the foreman, Juror
2 No. 10.

3 In looking at Verdict Form Count I, as to
4 victim Kirby Brown, Juror No. 10, the jury, then,
5 was deadlocked on aggravating circumstances 1 and
6 3; is that correct?

7 JURY FOREMAN: That is correct, Your Honor.

8 THE COURT: Juror No. 10, with regard to
9 Verdict Form Count II, relating to victim Lizbeth
10 Neuman, is the jury, then, deadlocked on
11 aggravating circumstance No. 1?

12 JURY FOREMAN: Yes, sir.

13 THE COURT: And then as to verdict form
14 Count III, relating to victim James Shore, is the
15 jury deadlocked as to aggravating circumstances
16 No. 1 and 3?

17 JURY FOREMAN: That's correct, sir.

18 THE COURT: Thank you, sir.

19 Again, no further polling of the jury
20 requested; is that correct?

21 MR. KELLY: No. Thank you.

22 THE COURT: Members of the jury, on behalf of
23 all the participants of the trial, I want to thank
24 you for your service to the community. I'm going
25 to tell you that I'm going to request in a moment

1 that you return to the large -- well, the hearing
2 room on this floor. And because I want to give you
3 further instructions and offer some more personal
4 thanks than what I'm going to just, essentially,
5 read here at this time. And also I'm going to
6 provide some information that may help you in
7 dealing with media, press type issues as well.

8 This isn't a mandatory. I'm requesting
9 that you do that. I understand that some of you
10 may wish to have a break and go outside. And
11 that's okay. I'm just going to ask that you follow
12 Ms. Rybar's instructions with regard to that. She
13 will tell you what to do.

14 But the admonition is now lifted. You
15 are free to talk about the case with anyone or not
16 talk about it as you wish. If someone asks you
17 about the case and you don't want to talk about it,
18 just advise them of that fact, and they will honor
19 your request. And that applies to everybody. It
20 applies to any form of media and just people on the
21 street. It applies to attorneys, people involved.
22 It's just up to you at this point. The admonition
23 will be lifted.

24 Again, I do have some information I want
25 to give you, though, in a few minutes, if you

1 return pursuant to Ms. Rybar's instructions.

2 Please leave with us your juror badges
3 and your notebooks. The bailiff will destroy your
4 notes, but the badges and the books will be used in
5 other cases.

6 Thank you once again.

7 Now, and I am going to be asking the
8 parties to remain for a few minutes.

9 But before I officially discharge the
10 jury, is there anything further for the record?

11 Ms. Polk?

12 MS. POLK: No, Your Honor. Thank you.

13 THE COURT: Mr. Kelly?

14 MR. KELLY: No.

15 THE COURT: Then at this time, ladies and
16 gentlemen, your jury service is now completed, and
17 you are excused. Again, thank you. And I will be
18 talking to you, those of you who decide to stay,
19 and I hope you do, in a little more depth.

20 But my heartfelt thanks for all the time
21 and attention that you've spent, everything you've
22 devoted to this case. And I'm thanking you on
23 behalf of everybody here. Believe me.

24 So the jury is excused at this time.
25 I'm asking the parties to remain.

1 Thank you.

2 (The jury is excused.)

3 THE COURT: Thank you.

4 The jury has existed. I'm going to
5 return the verdict forms to the clerk with the
6 instructions like I did with the other verdict
7 form. I want the actual -- the form that contains
8 the verdict to be sealed. The form that --
9 everything else in the form with the juror numbers
10 still there, that will be placed in the file. And
11 I want to do that with regard to the forms.

12 Mr. Kelly, you indicated you had a legal
13 matter you wish to discuss?

14 MR. KELLY: I do, Judge. It's a continuation
15 of our -- of our concern argued yesterday in
16 regards to the contents of Exhibit 734. We have
17 since during the past 24 hours -- and I have marked
18 as an Exhibit 1136. We've since obtained a copy of
19 Ms. Polk's opening statement, listened to the clips
20 which were played.

21 And those clips, and specifically the one
22 objected to, which is 734-31, is not or was not
23 played and was not contained in Ms. Polk's opening.

24 You had admonished Ms. Polk in her
25 representation yet again yesterday. And I'm

22

1 paraphrasing. But, Ms. Polk, there are serious
2 implications if this today is played to the jury
3 and it was not contained in the opening statements.

4 We have in addition to verifying that the
5 clip played yesterday was not played in the
6 opening -- we also got a copy of the transcript of
7 the testimony of Melissa Phillips when the
8 discussion in regards to Exhibit 734 was presented
9 to the Court.

10 And at the sidebar conference, Judge, you
11 asked the question, this is what was played in the
12 opening?

13 Ms. Polk responded, yes.

14 We had earlier -- Ms. Do and I -- on the
15 record indicated that we objected -- or excuse me.
16 I was actually the attorney. I objected to the
17 admission. It unduly emphasizes a portion of the
18 complete tape. There was a discussion amongst
19 court and counsel that we had not had the
20 opportunity to review the Exhibit 734. Ms. Do
21 indicates that on the record. We just haven't had
22 the opportunity to review the exhibit. I also
23 corroborated that position. I said I object to
24 Exhibit 734. I'm not sure what's on it. That's my
25 first question.

1 You then, as I started this discussion,
2 received confirmation from Ms. Polk that, in fact,
3 Exhibit 734 with the various clips, approximately
4 20, mirrored the clips played during the opening
5 statement. Exhibit 1136 shows that it did not.

6 THE COURT: You got that marked now?

7 MR. KELLY: I do, Judge. I also have courtesy
8 copies for the counsel and the Court if you wish to
9 have them.

10 You had used the term "serious
11 implications." We've now presented extrinsic
12 evidence to this jury that was not admitted. And
13 not only during the aggravation phase -- and that
14 was the thrust of the motion yesterday was to
15 strike the aggravators. And, of course, given this
16 misstatement, that's a potential remedy.

17 But, Judge, I would point out -- and I
18 agree that there are serious implications, because
19 I believe the clerk of the Court can verify or
20 confirm that Exhibit 734 was, in fact, provided to
21 the jury during its deliberations on the guilt
22 phase. So it's much more serious than simply the
23 aggravators.

24 THE COURT: It certainly is. It certainly is.

25 MR. KELLY: And, Your Honor, just one thing

24

1 before Ms. Polk responds. It actually took some
2 help from the media to prepare this DVD. It was
3 delivered to my office at 11:30. Tammy brought it
4 here. Miriam finished listening to it within the
5 last five minutes. So this is the very first
6 opportunity we've had to discuss this.

7 THE COURT: Ms. Polk.

8 MS. POLK: Your Honor, the state, first of
9 all, would ask that defense counsel provide to the
10 state the various references that they have made to
11 the record. It's not clear to me -- there was an
12 avowal made but references to exhibits, references
13 to various times were without benefit of a
14 transcript. And, of course, this was a four-month
15 trial.

16 The state would ask for the opportunity
17 to respond appropriately. To just throw this on
18 the state and make avowals and giving us this for
19 the first time. I would also ask that the FTR be
20 made available to the state so that we can go
21 through it and find the locations where the various
22 body of clips were played.

23 THE COURT: The FTR will be made available to
24 both sides. I indicated I've ordered it preserved
25 all the way back to the beginning of the trial. I

1 mean from jury selection on, every day.

2 And I recall my statement that -- and I
3 requested that anything be played be played
4 directly off the admitted exhibit. And I requested
5 that.

6 I anticipate, in any event, there could
7 be post-trial motions in this case.

8 Mr. Kelly, that's an oral motion. I'm
9 not going to -- I've got to listen to things and
10 look at that. I'm not going to rule right now on
11 this.

12 MR. KELLY: And, Judge, given that, and I
13 understand. Because I believe it's necessary for
14 Court and counsel to review 1136, review the
15 transcript. And we'd be happy to make a portion of
16 Melissa Phillips's testimony that we have. Looks
17 like about an eight-page transcript out of the
18 total that addresses this issue at sidebar.

19 734, of course, the Court has. And, of
20 course, we have it. It's not a surprise. We
21 discussed it yesterday, if you recall, the rather
22 assertive objection to it's playing. So with that
23 I believe all the parties will have the relevant
24 information.

25 And my request today -- because I agree,

1 Judge. I believe there are serious implications,
2 including a mistrial with prejudice. And given
3 that fact, I would ask that any further proceedings
4 in this matter be stayed until Ms. Polk has a
5 chance to review this information and the Court,
6 just as we have done.

7 THE COURT: This is not a proceeding -- the
8 trial has taken so many months, it's not going to
9 be a proceeding that would be rushed, in any event.
10 It would be my intention to set things in the
11 normal course, allow motion practice. If there are
12 requests for extensions, I'm going to consider that
13 and give either side appropriate time to address
14 issues after both sides get a chance to address
15 requests for extensions or anything else. But --

16 MR. KELLY: Judge, perhaps this suggestion,
17 then, in regards to my client. If he can report --
18 and I've already checked with your probation
19 department. Mr. Ventura has lined up Mr. Rygiel as
20 the individual who did the presentence
21 investigation. We have no objection to Mr. Ray
22 getting the package, meeting with Mr. Rygiel and
23 starting the process. We'd ask that all that
24 material be sealed.

25 THE COURT: It just won't be made public at

1 this point. So there is no need to seal it or have
2 it filed at this point.

3 MR. KELLY: If our motion is thus granted, it
4 can be destroyed. If not, we will have taken that
5 step forward. It's a suggestion.

6 THE COURT: Ms. Polk.

7 MS. POLK: Your Honor, two requests. One is
8 that the transcript -- the state requests that the
9 transcript be made available to the state. We do
10 not have access. And, again, a four-month trial
11 and picking excerpts here and there would not be a
12 fair representation of the trial.

13 Secondly, we would request that the Court
14 inquire of the jury whether, in fact, they listened
15 to Exhibit 734.

16 THE COURT: There is law about that. I don't
17 think that that's -- you're going to have to give
18 me some law on that, Ms. Polk. I just remember
19 reading a case when issue came up, and there was a
20 question of whether something was harmless and
21 whether the jury consulted it. And it's not just a
22 simple matter now of doing that.

23 MR. KELLY: Judge, in regards to the
24 transcript, that's the proprietary interest of your
25 court reporter.

1 THE COURT: And that's my answer. That needs
2 to be worked out with Mina Hunt -- with Mina Hunt.
3 That needs to be worked out in that fashion.

4 With regard to the -- I'm not going to --
5 if anybody has any law to the contrary, authority
6 to bring a jury back in and ask them -- they've
7 been discharged. They've been discharged. I asked
8 if there was anything further before the
9 discharging of the jury. And this would not be
10 something that would be appropriate to keep them.
11 It has hasn't been joined, and people haven't had a
12 chance -- both sides haven't had a chance to look
13 at the exhibits or anything.

14 MR. KELLY: Your Honor, if I may approach. I
15 have a -- just a courtesy copy of 1136 for the
16 Court.

17 THE COURT: Where is the actual 1136?

18 MR. KELLY: With the clerk.

19 THE COURT: 1136 is a post-trial exhibit at
20 this time.

21 MR. KELLY: Would you like this?

22 THE COURT: Yes, I would, Mr. Kelly. Thank
23 you.

24 At this point it's going to be of record.
25 If there is a hearing on this, it may be admitted

1 at this time.

2 MR. KELLY: Finally, Judge, if I had access to
3 a copy machine, we could make a courtesy copy of
4 this eight-page transcript relating to
5 Ms. Phillips.

6 THE COURT: You can do that. As I said, I'm
7 going to let the parties, the attorneys -- you can
8 have access back here. You can use the copier.
9 You can use the copy machine and then go down and
10 meet with jurors and those things.

11 Ms. Polk.

12 MS. POLK: Your Honor, if I could have
13 clarification. Is the defense conceding that this
14 was an admitted exhibit but claiming somehow that
15 it should not have been admitted? What is -- what
16 is the -- can I have clarification?

17 MR. KELLY: I can make it very clear. The
18 State of Arizona represented to this court that 734
19 had clips which were identical to the opening
20 statement. Yesterday the State of Arizona made
21 that representation to this court.

22 THE COURT: And I know because I wanted 734
23 used so there would be no mistake about it.

24 MR. KELLY: Both representations are not
25 correct. 734 does not contain the audio clips used

30

1 in the opening statement. And that is confirmed by
2 1136.

3 MS. POLK: And, Your Honor, again, that's
4 where the state would like the opportunity to
5 respond.

6 THE COURT: And you will.

7 MS. POLK: My representation to the Court is
8 that the audio clips had been admitted and played
9 during opening or through witness -- witness
10 testimony.

11 THE COURT: Yes.

12 MS. POLK: And beyond that I'm just not sure
13 what the defense is alleging.

14 THE COURT: Mr. Kelly, people are going to
15 have a chance to join this. But go ahead and state
16 succinctly, if you would.

17 MR. KELLY: The Court's question to Ms. Polk:
18 This is what was played in opening?

19 The response: Yes.

20 And it was not. That's succinct.

21 THE COURT: I understand these dates can be
22 subject to change. But I want to have things on
23 the calendar, and I can work with that. I am going
24 to set an initial sentencing date of July 25 at
25 3:00, order a presentence report. Mr. Kelly has

1 avowed that he's made arrangements with the
2 probation office. And that's satisfactory.

3 But I -- Ms. Polk, did you want to
4 address release or any other matter?

5 MS. POLK: Yes, Your Honor. Pursuant to
6 Rule 7.2(c) -- and I had made this motion before
7 after the guilty verdict, but the state would renew
8 this motion that the defendant be taken into
9 custody. Rule 7.2(c) of the rules of criminal
10 procedure states that after a person has been
11 convicted of any offense for which the person will
12 in all reasonable probability suffer a sentence of
13 imprisonment, and there is some exceptions, that
14 the person shall not be released on bail or on the
15 person's own recognizance.

16 And pursuant to this rule, the state
17 would ask that the defendant be taken into custody
18 at this time.

19 THE COURT: The existing conditions of release
20 will remain in effect at this time.

21 Counsel, I'm going to go back and speak
22 with the jurors again. I prefer that the attorneys
23 be there with me at that time. Just assemble here
24 in the hallway.

25 Thank you.

32

1 (The proceedings concluded.)

1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss: REPORTER'S CERTIFICATE

3

4 I, Mina G. Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript.

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 6th day of July, 2011.

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MINA G. HUNT, AZ CR No 50619
CA CSR No. 8335

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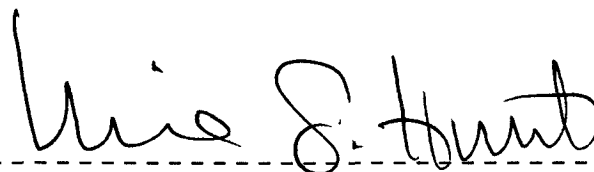
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24 MINA G. HUNT, AZ CR No. 50619
25 CA CSR No. 8335